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IN THE
Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE ON BEHALF OF A COMMITTEE OF CONCERNED BLACK GRADUATES OF ABA ACCREDITED LAW SCHOOLS: VICKY L. BEASLEY, DEVON W. CARBADO, TASHA L. COOPER, KIMBERLÉ CRENSHAW, LUKE HARRIS, SHAVAR JEFFRIES, SIDNEY MAJALYA, WANDA R. STANSBURY, JORY STEELE, ET AL., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici Curiae are a Committee of Concerned Black Graduates of ABA Accredited Law Schools, an ad hoc collaboration of individuals who now work in varied capacities in our nation and around the world.[1] As active participants in our democracy, our collective experiences, many of which are informed by our race, tell us that both in law school and beyond, race still matters. Amici's interest arises from our belief that the University of Michigan Law School's affirmative action program seeks to correct racial preferences embedded in its traditional admission criteria. A list of amici and the law schools they attended is attached as Appendix I. The views expressed in this

[1] This brief is submitted with the written consent of the parties. Pursuant to Rule 37.6, counsel represents that this brief was not authored in whole or in part by counsel of any party. Nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

brief are those of the individual amici and do not necessarily reflect the views of their respective law schools.

SUMMARY OF ARGUMENT

Programs that promote diversity serve a compelling state interest because they correct the systematic ways in which the traditional admissions criteria afford racial preferences and because they help to satisfy the democratic missions of American colleges and universities. In the instant case, racial diversity serves as a compelling state interest because it promotes the public and professional mission of the Respondent institution. Genuine racial diversity at the University of Michigan Law School (the "Law School") requires race conscious measures. Because the Respondent University of Michigan's admissions process relies so heavily on the LSAT and other race infused criteria, there are no effective race-neutral alternatives to diversifying this law school. In this respect, the Law School's use of race is narrowly tailored to counteract known exclusionary effects resulting from reliance on racially embedded admissions criteria. In addition, the Law School's public goals and democratic mission make consideration of race the most efficient and robust proxy for the attributes the Law School is seeking in its graduates. Race consciousness in admissions, therefore, is not a preference but a prophylactic.

ARGUMENT

CORRECTING THE SYSTEMIC WAYS TRADITIONAL ADMISSIONS CRITERIA EMBED RACIAL PREFERENCES IS A COMPELLING STATE INTEREST.

I. Universities Are Constitutionally Permitted to Counteract Racial Preferences Embedded in Traditional Admissions Criteria.

In Regents of the University of California v. Bakke,[2] Justice Powell's conclusion that the University of California Davis Medical School operated an unconstitutional quota system was based in part on the fact that the university had introduced no evidence that the traditional selection criteria were biased against students of color or that the conventional criteria failed to assess adequately these students' academic promise. According to Justice Powell, "Racial classifications in admissions conceivably could serve [another] purpose, one which Petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."[3] The University of California provided neither evidence of racial bias in traditional admissions criteria nor evidence relating to their failure to predict future performance.[4]

The assumed fairness and functionality of these criteria is at the heart of the evidence offered by Petitioner in this case. Her claim of "reverse discrimination" consists primarily of comparisons, between racial and ethnic groups, of the different admission odds for applicants with similar test scores and grade point averages.[5] Based upon this evidence, Petitioner contends that standardized test scores are a fair and adequate basis for determining who should be entitled to admission at selective colleges and universities, like the University of Michigan.[6] Petitioner presents deviations on standardized test scores as if they are dispositive criteria for assessing claims under the Equal Protection Clause.

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[2] 438 U.S. 265 (1978).

[3] Id. at 306 n. 43.

[4] See id. ("Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that Petitioner's special admissions program was formulated to correct for any such biases.").

[5] See William C. Kidder, Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research, 12 La Raza L.J. 173, 177 (2001) (summarizing the standard testing evidence presented at trial by Petitioner).

[6] See, e.g., Petitioner's Brief at 38-39, Grutter (No. 02-241).

However, the record in this case demonstrates that traditional admissions criteria are in fact flawed. These measures are not reliable predictors of academic merit or performance after graduation for all candidates.[7] The student intervenors in this case directly challenged Petitioner's presumption that standardized tests constitute objective measures of merit, and that affirmative action necessarily amounts to a preference for "lesser qualified" students of color. They presented evidence that heavy reliance on standardized aptitude test scores constitute built-in racial preferences for White applicants.[8] The intervenors correctly argued that affirmative action is justified, in part, to counterbalance the ways that tests like the LSAT and SAT tilt the admissions process to prefer affluent White candidates.[9]

A. *Properly understood, affirmative action is not a preference but an effective and efficient mechanism to counteract racial preferences.*

As Justice Powell argued in Bakke, "[t]o the extent that race and ethnic background were considered . . . to . . . cur[e] established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."[10] The

[7] See, e.g., Richard O. Lempert, David L. Chambers, and Terry K. Adams, From the Trenches and Towers: Law School Affirmative Action: An Empirical Study of Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 Law & Soc. Inquiry 395, 468-69 (Spring 2000) [hereinafter Chambers Study] (finding that Michigan's minority alumni who entered law school with lower LSAT scores and GPAs than those of White alumni were as successful as the White alumni).

[8] See generally Expert Reports, reprinted in 12 La Raza L.J. at 373, 377, 387 & 399 (2001) (discussing the issue of the racial/ethnic bias on the LSAT and SAT).

[9] See Miranda Massie, Grutter v. Bollinger: A Student Voice and a Student Struggle: The Intervention in the Univ. of Michigan Law School Case, 12 La Raza L.J. 231, 233 (2001) (explaining that "racism and unearned White privilege continue to structure every aspect of educational experience in the U.S. and in particular, unavoidably mar the use of allegedly meritocratic criteria like LSAT scores and grades").

[10] 438 U.S. at 306 n. 43.

empirical data demonstrating the nexus between race and traditional academic criteria make clear that affirmative action is a corrective mechanism to ameliorate the extent to which White racial preferences are incorporated into traditional admissions criteria. Indeed, affirmative action is not a preference but a prophylactic. Equal protection is inconsistent with a rule that requires institutions to ignore the ways that their own institutional practices disadvantage and undervalue minority students.

1. *The LSAT is reflective of racial preferences.*

a. The LSAT is a flawed instrument for assessing merit or predicting law school performance.

Since Bakke, the fairness and functionality of admissions criteria have been hotly contested by scholars who question the current emphasis on standardized aptitude test scores that define our commitment to meritocracy. Although the LSAT and other similar aptitude tests benefit from widely shared assumptions that they are an objective yardstick to measure who will do well in law school or college, recent scholarship and evidence presented in this case demonstrate that these assumptions are unmerited. Such tests, for example, do not reliably predict those most likely to perform well in college or law school.[11] Nationwide, the LSAT is about 9 percent better than random in predicting variation in first year law school grades.[12] "There appears to be a threshold beyond which LSATS *just don't matter* in terms of predicting law school

[11] See Lani Guinier, Jane Balin and Michelle Fine, Becoming Gentlemen: Women, Law School, and Institutional Change 38-41 (1997) (LSAT explains at most 21% of the variance in law school grades for all students by the third year of law school and even less for the first two years); see also Luke Charles Harris and Uma Narayan, Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate, 11 Harv. BlackLetter L.J. 1 (1994).

[12] See Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 UCLA L. Rev. 1251, 1264 (1995).

performance for both men and women. Furthermore, some students with an LSAT of 30 [which was below this threshold] do as well in law school as others with perfect (48) or near-perfect scores."[13]

Neither the LSAT nor other high-stakes aptitude tests reliably identify those applicants who will succeed long-term, whether in college, law school or later in life. For example, a recent study of University of Michigan graduates shows that traditional admissions processes are not better predictors of success after law school—whether success is measured by earned income, career satisfaction or service contributions—than are more whole person selection criteria employed by the law school in its efforts to promote racial diversity.[14]

Part of the problem is "that neither cumulative grade point averages nor national aptitude test scores have ever been shown to be anything more than rather crude instruments for predicting first year grade point averages in given academic settings; and after the first year their predictive value decreases sharply."[15] Indeed, even this predictive value is overshadowed by the stronger correlation between test performance and socio-economic status.[16] The particular problem for the purposes of this litigation is that "whatever the short-comings of [standardized tests as] 'predictors of ability' for Americans in general, they are even more

[13] Guinier et al., supra, at 41 (emphasis in original).

[14] See Chambers Study at 468-69.

[15] Luke Charles Harris, Rethinking the Terms of the Affirmative Action Debate Established in the Regents of the Univ. of California v. Bakke Decision, 6 Research in Politics & Society 133, 145 (1999).

[16] See Susan Sturm and Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953, 988 nn. 148-52 (July 1996).

untrustworthy insofar as certain minority group members are concerned."[17]

b. The methods of constructing standardized tests prefer White test takers and predictably marginalize Blacks and other minorities.

The creators of standardized tests routinely invalidate questions on which minorities perform better than Whites and utilize questions on which White students perform better than minorities. In other words, test-makers *eliminate* most questions on which Blacks and women out-perform Whites and men. Although most test-makers discard many of the questions that produce what are considered by the test-makers to be significant disparate impacts between racial or ethnic groups, they do not remove questions with a more moderate preference. The record here shows that the racial bias in question selection is not small.[18] Indeed, researchers have found ethnic differences in every one of 580 SAT questions administered in New York State in 1988 and 1989:[19] 574 preferred White test-takers, one preferred Black test-takers, and five questions were neutral.[20]

Because all of the LSAT questions are pre-tested, test-makers can actually "predict the percentage of women, Blacks, Latinos etc., who will choose the correct answer."[21] Thus, *before* they give the test, test-makers know the discriminatory impact

[17] Harris, supra, at 145.

[18] See, e.g., Expert Report of Jay Rosner, Grutter v. Bollinger, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), reprinted in 12 La Raza L.J. 377 [hereinafter Rosner Expert Report].

[19] Id.

[20] Id. at 379-82.

[21] Id. at 379.

their tests will have on women and minorities. As Rosner has argued:

> The actual task that Law Services performs, year-in and year-out, is accumulating a test full of individually-chosen LSAT questions with foreseeable cumulative effects that on average:
>
> a) Whites will score higher than Blacks;
> b) men will score higher than women; and,
> c) wealthy students will score higher than poor students.[22]

Thus the racial bias in standardized tests is not accidental; it is known by test makers and is actively structured into the very constitution of these tests. As this Court recognized in City of Richmond v. J.A. Croson Co., "public institutions have a public obligation not to become a 'passive participant' in a system of racial exclusion . . . ."[23] Respondent University of Michigan's race-conscious evaluation of applicants is a modest effort to correct the discriminatory effects of this industry-wide phenomenon within its own admissions process.

c. Performance on standardized tests is not an objective measure of academic competence.

As a general matter, White students perform better on standardized tests than Blacks and Latinos. Because of the empirical work of, among others, Dr. Claude Steele, a professor of social psychology at Stanford University, it is now known that Black underperformance on standardized tests is due, at least in part, to "stereotype threat," that is, the apprehension faced by minority students that their performance on standardized tests will

[22] Id.

[23] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

confirm the stereotype that they are intellectually inferior to Whites.[24] Steele explains stereotype threat as:

> the experience of being in a situation where one recognizes that a negative stereotype about one's group is applicable to oneself. When this happens, one knows that one could be judged or treated in terms of that stereotype, or that one could inadvertently do something that would confirm it. In situations where one cares very much about one's performance or related outcomes—as in the case of serious students taking the SAT—this threat of being negatively stereotyped can be upsetting and distracting. Our research confirms that when this threat occurs in the midst of taking a high stakes standardized test, it directly interferes with performance.[25]

This threat is real, empirically verifiable, and is a material burden on minorities who take standardized tests. According to Steele, "[r]elying on these tests too extensively in the admissions process will preempt the admission of a significant portion of highly qualified minority students."[26]

At the same time Whites, precisely because of race, do not have the burden of stereotype threat. They benefit from not being racially stigmatized. Standardized tests perpetuate this racial benefit; affirmative action helps to mitigate it—and without stigmatizing Whites.

Because stereotype threat renders Blacks dissimilarly situated to Whites vis-à-vis standardized tests, universities such as the Respondent University of Michigan take this difference into

[24] See Expert Report of Claude M. Steele, Grutter v. Bollinger, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), reprinted in 5 Mich. J. Race & L. 439, 444 (Fall 1999) [hereinafter Steele Expert Report].

[25] Id. at 444.

[26] Id. at 440.

account consistent with the commands of the Equal Protection Clause. This dissimilarity cannot be reduced to nor ameliorated by class. Indeed, Professor Steele finds that stereotype threat is likely to be exacerbated, and not mitigated, by middle class status.[27]

Thus, race *itself*, not just socio-economic disadvantage, triggers underperformance on standardized tests. Considerations based on income cannot adequately compensate for the correlation between test performance and race. Affirmative action thus serves as a modest constitutionally permissible mechanism to take into account the various ways that the predictive measures upon which the University of Michigan Law School relies do not fully reflect the abilities of all applicants across race.

2. Legacy and financially(wealth)-based selection criteria operate as a racial preference for White applicants.

Both Petitioner and the Solicitor General consistently refer to affirmative action as a racial preference. Yet many traditional selection criteria, such as legacy admissions and standardized test scores, directly benefit White applicants.[28] This discrimination is empirically identifiable and materially affects admissions.

The Respondent University of Michigan, like most law schools and universities, treats as "plus factors" legacy and potential for making financial contributions, although both criteria (because of the racial allocation of wealth) privilege Whites.[29] These are preferences in the truest sense of the word. They are in no way measures of past or future success, and they operate to

[27] See id. at 447.

[28] See Goodwin Liu, The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1068-71 (2002); see also Steele Expert Report, supra, and Rosner Expert Report, supra.

[29] See generally Melvin Oliver and Thomas Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality (1995).

benefit a specific group of people—namely, affluent White applicants. As these preferences demonstrate, schools frequently depart from ostensibly objective criteria. Yet, as the Petitioner's argument in this case demonstrates, the preoccupation with race obscures the operation of these preferences and creates a distorted race-centered perception of why they were not admitted.[30]

B. Universities should be permitted to employ affirmative action to counteract the racial preferences embedded in traditional admissions criteria.

To the extent the "playing field" of admissions is slanted in favor of Whites, universities have an obligation to level it. This Court has long held that eliminating racial discrimination is an important governmental interest that is consistent with our constitutional values of equality, dignity, and opportunity. Justice Powell's opinion in Bakke makes this abundantly clear:

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with Brown v. Board of Education,[31] attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment.[32]

Because the traditional selection criteria lead to "identified discrimination," there is an affirmative constitutional duty on the

[30] Petitioner claims that she was not admitted to the law school because "less-qualified" minorities were admitted instead of her. (Pet. Brief at 2-3). Yet, in the chart provided in Petitioner's brief (which only addresses GPA and LSAT scores while excluding many other factors considered by the university), White applicants who were "less-qualified" than Petitioner were admitted the year before she applied. Id. at 7.

[31] Brown v. Topeka Board of Education, 347 U.S. 483, 493 (1954).

[32] Bakke, 438 U.S. at 307.

part of the states to eradicate or at least offset it. This Court has long held that states are able to voluntarily make race-conscious efforts to prevent race discrimination.[33]

As Justice Powell stated in Bakke, the "guarantee of the equal protection clause cannot mean one thing when applied to one individual and something else to a person of another color. If both are not accorded the same protection, then is it not equal."[34] Thus, the Equal Protection Clause cannot be interpreted to insulate White applicants' enjoyment of preferences built into standardized tests and other admissions criteria while denying the University of Michigan Law School the right to ameliorate those preferences on behalf of otherwise excluded minorities.

[33] See, e.g., Wygant v. Jackson Bd. of Education, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-66 (1977); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971); Green v. County School Board of New Kent County, VA, 391 U.S. 430, 437-38 (1968). See also Bakke, 438 U.S. at 365 (Brennan, J., concurring in the judgment in part and dissenting in part).

[34] Bakke, 438 U.S. at 289-90.

II. Racial Diversity Is a Compelling State Interest Because It Satisfies the Academic and Democratic Mission of Public Universities and the Mission of the Respondent Institution.

A. Because race is not simply skin color, but a marker for social status, experience, and access to wealth, racial diversity serves the academic mission of public universities.

1. This Court has repeatedly affirmed the value and necessity of racially diverse educational environments.

Recognizing the nexus between racial experience and education, this Court has consistently concluded that racial diversity in higher education is a vital component of an effective education. For example, in Sweatt v. Painter[35] (a challenge to racial segregation at a public law school) this Court reasoned that:

> [t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[36]

McLaurin v. Oklahoma State Regents for Higher Ed., 339 U.S. 637 (1950) (concluding that "the ability . . . to engage in discussions and exchange views" with students of diverse racial backgrounds is central to an effective graduate education); Brown, 347 U.S. at 493 (providing that public education is "a principal instrument" in the development of "cultural values").

[35] Sweatt v. Painter, 339 U.S. 629 (1950).

[36] Id. at 634.

In Bakke, Justice Powell reaffirmed the logic of these prior rulings, finding that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."[37] According to Justice Powell, concrete and material "educational benefits . . . flow from an ethnically diverse student body."[38] Recognizing that race can be a proxy for experience, Justice Powell found that medical students of varying racial backgrounds may bring to campus "experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[39] Justice Powell reasoned that such racial diversity was an important ingredient in creating the "atmosphere of speculation, experiment and creation . . . so essential to the quality of higher education."[40] Because of these benefits, Justice Powell concluded that admissions programs "involving the competitive consideration of race and ethnic origin" are constitutional.[41]

2. *Racial diversity helps to create and sustain a robust marketplace of ideas.*

Racial diversity helps to create a robust marketplace of ideas by performing two important speech-related functions, each of which derives from the fact that race continues to shape social relations and experiences. First, racial diversity performs a content function. That is, to the extent a school is racially diverse, such racial diversity likely will have an effect on the substantive issues that are engaged in the classroom. For example, a constitutional criminal procedure class is more likely to engage in a conversation about racial profiling with Black students than

[37] 438 U.S. at 311-12.

[38] Id. at 306.

[39] Id. at 314.

[40] Id. at 312 (internal quotations omitted).

[41] Id. at 320.

without them.[42] The speech-content component of racial diversity is also evidenced by the manner in which universities have altered their curricular offerings in response to the constructive demands of a racially diverse student body.[43]

Acknowledging the relationship between racial experience and speech is not tantamount to concluding that, for example, all Black people think alike. It simply means, as this Court has recognized, that with respect to some issues, there is a high level of correlation between race and perspective,[44] a correlation that is much stronger than that between LSAT scores and first year law school grades. If part of the project of universities is to promote the full exchange of ideas, and if there is a relationship between ideas and racial experiences, universities should be permitted and encouraged to pursue racial diversity. Without it, important ideas may be lost, and the academic mission of universities compromised.

Justice O'Connor recognized this substantive content function of diversity in her tribute to the late honorable Justice

[42] See Roxanne Harvey Gudeman, Faculty Experience with Diversity: A Case Study of Macalester College, in Diversity Challenged: Evidence on the Impact of Affirmative Action 251, 258 (Gary Orfield and Michael Kurlaender eds., 2001) (finding that because of the racially divergent experiences of minorities and non-minorities, minorities often introduce issues and analyses that are not generally raised by non-minority students).

[43] See Kimberlé Crenshaw, A Foot in the Closing Door, 49 UCLA L. Rev. 1343 (June 2002) (linking student diversity to both curricular changes in law schools and theoretical developments about the law).

[44] See, e.g., Easley v. Cromartie, 532 U.S. 234, 257-58 (2001) (concluding that "race in this case correlates closely with political behavior" and "racial identification correlates highly with political affiliation"); Miller v. Johnson, 515 U.S. 900, 916 (1995) (concluding that legislatures "will . . . almost always be aware of racial demographics"); see also Donald R. Kinder and Lynn M. Sanders, Divided by Color: Racial Politics and Democratic Ideals (American Politics and Political Economy) (1997) (discussing racial disparities in voting practices and policy preferences).

Thurgood Marshall.[45] There, she suggested that Justice Marshall's influence on her derived, at least in part, from the fact that they had "traveled [down] different road[s]."[46] Justice O'Connor commented that while, as a woman she had "experienced gender discrimination enough,"[47] she had no "personal sense . . . of being a minority in a society that cared primarily for the majority."[48] Justice O'Connor makes clear that while she did not always agree with Justice Marshall, she still finds herself "looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world."[49]

Justice Marshall's stories were a direct result of his racial experiences as a Black man in America. This Court's jurisprudence would be different had Justice Marshall not been a member of the Court—and not simply in terms of the outcome of the cases but the nature and content of the constitutional discourse reflected in them. It is precisely this difference—intellectual, perspective, and experiential—that will be lost to the extent that universities are no longer racially diverse.

The second speech function of diversity is that diversity facilitates active listening, learning, and engagement. Because America remains profoundly racially segregated, many university students will have had very little meaningful interracial contact. Respondent University of Michigan expert report, which Petitioner has not rebutted, demonstrates that negotiating the new interracial experience helps to engender critical thinking and intellectual

[45] See Sandra Day O'Connor, A Tribute to Justice Thurgood Marshall: Thurgood Marshall: The Influence of a Raconteur, 44 Stan. L. Rev. 1217 (June 1992).

[46] Id. at 1219.

[47] Id.

[48] Id. at 1217.

[49] Id. at 1220.

group cooperation.[50] In short, because we evaluate speech based not only on what is being said but also based on who is saying what, diverse educational environments are more "attention-grabbing," engaging, and thus critical thinking-inducing, than environments without racial diversity.[51]

3. The speech benefits of diversity cannot be realized with token representation and without race conscious admissions.

None of the foregoing speech functions of diversity can be realized with only token representation. If, for example, there are few Black students in a law school class, those students may not feel comfortable speaking—or at least speaking uninhibitedly. As the experiences of UCLA Black Law students attest, they may fear that they are expected to speak for their race and that whatever they say will be interpreted as "the Black perspective."[52] This suggests that individual Black students may feel, and are perceived to be, more racially salient in less racially diverse classrooms. Black students are less free to be "just individuals" when there is only token Black representation. The lack of racial diversity actually promotes, rather than discourages, racial identification, racial awareness, and racial consciousness.

[50] See Expert Report of Patricia Y. Gurin, Grutter v. Bollinger, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-7592) (explaining how "[c]omplex thinking occurs when people encounter a novel situation for which . . . they have no script, or when the environment demands more than their current scripts provide. Racial diversity . . . provides the very features that research has determined are central to producing the conscious mode of thought educators demand from their students.").

[51] See Shelley Chaiken, Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion, 39 J. Personality & Soc. Psych. 752 (1980) (suggesting that people pay attention to the identity of the speaker and not just the content of the speech).

[52] See Brief of Amici Curiae Students of Color Against Resegregation of Education in Support of Respondent, Sonia Merecado, Counsel of Record at 12-18 (2003).

Token representation also sends a message that Blacks are incapable or undeserving of higher learning, creating the specter and confirming the stereotype of Black intellectual inferiority.[53] The fewer Blacks there are, the stronger the likelihood that this "stereotype threat" will be "in the air."[54] Far from stigmatizing Blacks, affirmative action counteracts the stigma of Black intellectual inferiority, the existence of which decreases the likelihood that Black students will contribute to the foregoing speech functions of diversity.[55]

B. Racial diversity promotes the democratic mission of public schools.

This Court has repeatedly recognized that ethnically diverse educational settings promote values that are vital to the sustenance of our multicultural, pluralistic democracy. Central to this Court's repudiation of segregation in Brown is the idea that public education "is the very foundation of good citizenship" and is "required in the performance of our most basic public responsibilities."[56] The Brown court specifically emphasized that public education allowed for the instilling of civic values and facilitated the adjustment of students to our democratic culture.[57] In Bakke, the Court amplified the link between a diverse education and democracy, stressing that "it is not too much to say that the nation's future depends upon leaders trained through wide

[53] See Brown, 374 U.S. at 494 (observing that segregation imposes feelings of inferiority upon Black children).

[54] See Claude M. Steele, A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance, 52 Am. Psychologist 613 (1997).

[55] See also Expert Report of William G. Bowen, reprinted in 5 Mich. J. Race & L. 427, 435 [hereinafter Bowen Expert Report] (asserting that "a student body containing many different backgrounds, talents, and experiences would be a richer environment in which all students could better develop into productive, contributing members of our society").

[56] Id. at 493.

[57] See id.

exposure to the ideas and morals of students as diverse as this Nation of many peoples."[58]

Because universities are important sites for citizenship formation, racially diverse educational settings help to promote a racially diverse and mutually cooperative citizenry. What students learn in school, they practice in society. Diverse campuses teach students a core value of democracy: to embrace and respect differences. Furthermore, because elite schools like the University of Michigan educate the nation's economic, political and social leaders,[59] the failure of these schools to admit a broad cross-section of society denies the excluded groups the democratic opportunity to define substantively the economic, political, and social content of American life.[60]

Diverse student bodies allow law schools like Respondent University of Michigan to realize their commitment to public service, a commitment that is consistent with our democratic values. Empirical evidence demonstrates that Black, Latino and Native American graduates use their legal education to accomplish, at higher rates than their White counterparts, the public mission of the law school as defined by the mission statement of both the University of Michigan Law School and the American Bar Association.[61]

[58] Bakke, 438 U.S. at 313. Gurin empirically substantiated the conclusions of the Brown and Bakke courts finding that "students educated in diverse settings are . . . better able to participate in an increasingly heterogeneous and complex democracy." Supra.

[59] See generally William G. Bowen and Derek Bok, The Shape of the River: the Long-Term Consequences of Considering Race in College Admissions 156-62 (1998) (discussing the prominent role graduates of selective colleges and universities play in society).

[60] See Bowen Expert Report at 435 (explaining that "race neutral admissions . . . would severely damage the prospects for developing a larger minority presence in the corporate and professional leadership of America").

[61] The Law School "looks for students likely to become 'esteemed practitioners, leaders of the American bar, significant contributors to legal scholarship and/or

III. Genuine Racial Diversity At Respondent Law School Requires Some Race Consciousness.[62]

A. The University of Michigan Law School's admissions program is narrowly tailored.

1. The University of Michigan Law School's use of race is narrowly tailored to counteract the racial bias embedded in the LSAT tests and other traditional criteria. Respondent's use of race as "one factor among many" is in accordance with Bakke and is the most narrowly tailored mechanism to diversify the law school.

2. The determination of narrow tailoring must be institution specific.

An across-the-board determination of what constitutes narrow tailoring—a constitutional formalism that requires schools in Michigan and Texas to narrowly tailor in precisely the same way—would limit law schools' capacity to experiment and impose upon them admissions plans that are doomed to fail. To be

selfless contributors to the public interest'." Chambers Study at 396 (quoting Admissions Policy Adopted by the Univ. of Michigan Law School Faculty, April 24, 1992 at 1). The Law School also expects that all those it admits will "'have a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.'" Id. The Preamble to the ABA Model Rules states unequivocally that "[a] lawyer is a representative of clients, an officer of the legal system and public citizen having special responsibilities for the quality of justice .... As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession ...." Model Code of Prof'l Conduct Preamble (2003).

[62] See Vikram D. Amar, The Bush Administration and the Supreme Court's Michigan Affirmative Action Cases: Narrow Tailoring and Alternative Methods of Ensuring Diversity, available at http://writ.findlaw.com/amar/20030207.html (February 7, 2003) (explaining that percentage plans have a serious flaw in that "[w]hatever success they achieve is possible only because of racial segregation in neighborhoods and high schools").

meaningful, the narrow tailoring analysis has to be contextual, taking into account the particular constraints and realities of specific institutions. Because universities are not monolithic, have different application pools, and are situated in different geographic regions, there can be no one standard for judging whether an admissions policy is narrowly tailored. The inapplicability of the percentage plans to law schools is but one ample demonstration of this point. The determination of reasonable alternatives has to be made contextually.[63]

3. Alternatives proposed by the Solicitor General do not apply in the law school context.

In its amicus brief, the United States argues that percentage plans adopted in California, Florida and Texas are viable alternatives to race-based affirmative action. All of the percentage plans cited by the Solicitor General use high school grades to determine eligibility. These plans further suffer from the serious flaw that they do not address diversity issues related to graduate and professional school admissions, as well as admission to any private university or college that seeks to draw students from around the nation, and indeed around the world. For graduate schools there is no workable way to implement a percentage plan that would take a certain percentage of college graduates and offer them admission. There are far too many schools around the country with varying standards, so it would be impracticable as well as undesirable to implement such a plan at the graduate school level.

[63] See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); see also Susan Sturm, Second-Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001) (discussing how the Court adopted an employer framework that is designed to encourage experimentation and problem solving by employers).

B. Percentage plans are not race neutral alternatives to race conscious admissions.

Not only are percentage plans unworkable in the context of graduate education, they present no comparative advantage in terms of their race neutrality. Thus, not only does the Solicitor General fail to highlight the functional limitation of percentage plans, he also fails to acknowledge that whatever their merit might be outside of the precise constitutional inquiry at hand, they are not race-neutral alternatives to the law school's race conscious admissions policies.

The United States, in its brief, attempts to convince the Court that plans such as the percentage plans implemented in California, Texas, and Florida are race neutral alternatives to race based affirmative action. Percentage plans from their inception were designed and implemented in an attempt to soften the blow of court action in Texas, a referendum in California, and administrative action in Florida that effectively eliminated the use of race as a factor in the admissions decisions of public universities in those states.[64] The plans were implemented with the full awareness that the level of enrollment of underrepresented minorities, without the use of race-based affirmative action, would dwindle to a trickle without some affirmative intervention. The plans were therefore implemented in an effort to maintain and hopefully increase racial diversity in the various public institutions. The percentage plans therefore attempt to achieve the same goals as race-based affirmative action but by a route that is more circuitous.

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[64] The states of California, Texas, and Florida each have a history of providing limited access to higher education for minorities, and this historical problem has been further exacerbated by the historically separate and unequal public elementary and secondary school systems. See Catherine L. Horn, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences published by The Civil Rights Project Harvard Univ., available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf (February 2002).

The purported race neutrality of percentage plans is further belied by the fact that such plans rely on and tacitly condone secondary school segregation. Both in terms of their objectives and their operation, percentage plans are race conscious policies. Because their workability is contingent on racial patterns, urban/rural configurations, targeted recruiting, and other factors, they are not race-neutral alternatives to affirmative action. The shortcomings of percentage plans do confirm, however, the basic logic of racial inclusion: the narrowest, most efficient and constitutionally sound way to achieve the compelling state interest in racial diversity is to take race directly into account. The University of Michigan Law School's affirmative action plan is thus a narrowly tailored means to achieve its compelling state interest in diversity and should be upheld by this Court.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be upheld.

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Dated: February 18, 2003

APPENDIX

APPENDIX I

No. 2-241

Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools In Support of Respondents

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